Supreme Court, U.S.
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In The

Supreme Court of the United States

ALLEN HERSCHAFT,

Petitioner,

v.

THE NY BOARD OF ELECTIONS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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83pgs

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals and the District Court erred by overstepping their authority in holding (without precedent) that one of the prongs for demonstrating a disability under the ADA ie: the history or record of impairment (which substantially limited a life's major activity in the past) – this prong, does not apply to this case and that plaintiff was not therefore disabled, even though defendant stipulated in an exhibit in the trial court that plaintiff was substantially limited in a life's major activity back in 1987-88.

Whether the Court of Appeals erred in holding that Plaintiff was not substantially limited in the life's major activity of socialization when there has been a split in the circuits regarding whether socialization constitutes a major life's activity and the evidentiary showing necessary to demonstrate a substantial limitation to such activity.

Whether the other justifications of the District court holding that Plaintiff would not be entitled to an accommodation even if he were disabled (ie. that the ADA would cause the defendant to be violating state law because the state law was otherwise constitutional and; 2. whether granting plaintiff an accommodation under the election law in NY would cause a fundamental change, alteration in the political, election process) runs contrary to prior US Supreme Court precedent and to the equitable principles of estoppel.

QUESTIONS PRESENTED FOR REVIEW – Continued

Whether the Court of Appeals erred by not applying the latest US Supreme Court Equal Protection violation standard with respect to the ADA as held in *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, 966-967 (2001) which did not require an Equal Protection violation showing of "purposeful discrimination" under the ADA as the Court of Appeals held is required in its Summary Order citing *Johnson v. Wing*, 178 F.3d 611, 615 (2nd Cir., 1999).

Whether the charge of Judicial Misconduct against the trial judge as a result of the July 9th, 2001 hearing regarding the parties' cross-motions for Summary Judgment and the subsequent decision by the Judicial Council for the Second Circuit *In re Judicial Complaint*, (02-8503) implicates violations or possible violations of pro se plaintiff's procedural due process rights in the case.

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THE DATE THE ORDER TO BE REVIEWED WAS ENTERED

On May 13th, 2002 a Summary Order Affirming the Lower Court's Grant of Summary Judgment to the defendant was entered by the clerk for the Second Circuit Court Of Appeals. *Herschaft v. The NY Board Of Elections*, 2002 WL 1225107 (2nd Cir., May 2002).

JURISDICTIONAL BASIS FOR THE US SUPREME COURT

The case involves the interpretation of a Federal Statute the A.D.A. act (Americans With Disabilities Act) and also involves Constitutional Questions specifically the validity of NY Election Laws. 6-138(4) under the 14th Amendment of the US constitution- the Equal Protection Clause.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED IN THE CASE

1. The Fourteenth Amendment to the US Constitution Section One . . . .

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Mckinney's NY Consolidated Laws Annotated- NY Election Law s. 6-138(4)

"A signature made earlier than 6 weeks prior to the last day to file independent petitions shall not be counted . . . ."

THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal and Constitutional Questions under the ADA and under the 14th amendment of the US constitution are involved in the case.

STATEMENT OF THE CASE

This is an action grounded in a 14th Amendment challenge to provision #6-138(4) of the NY Election Law and also under the ADA act and Rehabilitation Acts, State and City Anti-discrimination acts and Human Rights Law.

After having sent three certified letters to the defendant asking for a response to the Plaintiff's inquiries as to whether the Board could grant Plaintiff an accommodation, a waiver of NY Election law 6-138(4) so that Plaintiff could start to gather petition signatures earlier than the law provides for, Plaintiff was notified on May 13, 2000 that the Board doesn't have the power nor authority to waive any provision of the said election law and that the Board cannot rule on any alleged constitutional violations. On Monday, May 15th, 2000 Plaintiff brought suit against the Defendant in the Eastern District Court of NY. At the Eastern District court level, on May 18, 2000 before Judge Weinstein, papers were submitted by the parties during the hearing or shortly thereafter. On May 31, 2000 Judge Weinstein entered an Order granting the defendant's

Motion to Dismiss. *A. v. The NY Board Of Elections*, 99 F.Supp. 2nd 258 (E.D. NY, 2000).

On Appeal, to the 2nd Circuit before a 3 judge panel, a Summary Order was issued which affirmed in part the District Court decision (on 14th Amendment grounds) and reversed and remanded in part the lower court decision on the ADA claim. *Herschaft v. The NY Board Of Elections*, 2000 WL 1655036 (2nd Cir., Nov., 2000).

After this Plaintiff petitioned this court for a Writ of Certiorari for an Expedited Review of the Dismissal on 14th Amendment grounds which was denied on Dec 04, 2000, *Herschaft v. The NY Board Of Elections*, 531 US 1034 and *cert. denied* on January, 04, 2001, *Herschaft v. The NY Board Of Elections*, 121 S. Ct. 777.

On April 12th, 2001 there was an Oral Argument before the honorable Judge Carol Amon (Judge Weinstein had recused himself from this case because of the fact that he had done so earlier in another case of the plaintiff's in June of 2000, *Herschaft v. The NYC Campaign Finance Board*, 122 S. Ct. 201 (US, Oct. 1, 2001) on the Defendant's Motion to Dismiss and Plaintiff's Motion for a Preliminary Injunction. On that day, defendant's motion to dismiss was denied. After plaintiff amended his complaint and submitted an affidavit in support, he penned a motion for a Preliminary Injunction which was denied on May 04th, 2001.

On June 4th, 2001 there was a joint stipulation that was agreed to amongst the Parties that in 1988, Plaintiff was Qualified Disabled under the ADA in that during the period he was ill in 1988 he was substantially limited in a life's major activity.

After this, the discovery procedures were expedited and the dispositive motions were filed by the middle to end of June 2001.

On July 09th, 2001 there was an Oral Argument scheduled on Plaintiff's and the defendant's Cross Motions for Summary Judgment. It appears that at this hearing according to the Second Circuit Chief Judge John Walker, the trial court judge "explored ideas and theories that were not presented either by the defendant or Plaintiff" and appeared according to Plaintiff as if the trial judge was leading and walking the defendant (and not the pro se plaintiff) through arguments that the defendant had not made prior to this hearing and then decided the case through some of these same ideas. *In re Charge of Judicial Misconduct*, Judicial Council of the Second Circuit (02-8503) (April 18, 2002) at *2. See also the judicial misconduct complaint.

Also alleged by plaintiff, at this hearing, the trial judge stated on p. 28-9 of this testimony: "Seeing that a plaintiff was excluded from participating as a result of his disability, defendant would be required to make a reasonable modification to policies practices and provisions unless the public entity could demonstrate that the modifications would fundamentally alter the nature of the service, program or activity. Now, you haven't purported to make that showing at all, correct?" To which the attorney for defendant remarks " . . . I mean it won't fundamentally alter the way the election is being conducted." (P. 29 of the hearing of July 9th, 2001) And then in the decision of August 13th, 2002 in the decision the Judge includes this as one of the reasons why plaintiff should be denied an accommodation even though this argument employed in the decision should not have been done so by the principal

of estoppel based on the defendant's own testimony at this hearing.

On August 13th, 2001 in a Memorandum and Order, the defendant's Motion for Summary Judgment was granted and the Plaintiff's Motion for Summary Judgment was denied. *Herschaft v. The NY Board Of Elections*, 2001 WL 940923, 2001 US Dist Lexis 11801 (E.D. NY, Aug. 09, 2001)

On August 16th, 2001 Plaintiff filed a Notice of Appeal with the Second Circuit.

On Jan. 17th, 2002 Plaintiff filed a Complaint against Judge Amon because of her handling of the case in the court below on July 9th, 2001 under 28 USC s.372(c) with the clerk of the Second Circuit Court of Appeals. *In re Charge of Judicial Misconduct*, Judicial Council of the Second Circuit (02-8503) (April 18, 2002) The reason why this was not done more expeditiously was because Plaintiff only received a copy of the July 09th transcript early in Jan. of 2002. There was a delay.

On March 29, 2002 the following statement by the Second Circuit was issued in a similar pro se ADA case, *Wiexel v. The Board of Education of the City of NY*, 287 F.3rd 141-42 (2nd Cir, Mar. 2002) which seemed to apply to our case (except that in our case the judge appeared to walk the defendant through argument and theories that it never made and then decide the case on that basis in part): "Cases involving pro se plaintiff's pose a difficult dilemma for a district court. While courts are required to read a pro se pleading to suggest the strongest arguments that can be made they must refrain from trying the litigant's case for him or her, or from reading necessary facts into the pleadings. District courts are often presented

with the quandary of whether or not to consider legal theories suggested by the facts but not raised or argued by either party. *Id.* at 141-42.

On April 18th, 2002 plaintiff was notified by the Second Circuit clerk that his judicial misconduct complaint was dismissed. *In re Charge of Judicial Misconduct*, Judicial Council of the Second Circuit (02-8503) (April 18, 2002) at *2 Specifically, the order states that "Judges are allowed, and expected, to raise and analyze issues that are relevant to an action even if the parties fail to do so." Plaintiff states maybe so, but there was no excuse for defendant to raise certain issues for the first time which is evidence of a lack of quality workmanship. And the Judge's leading the defendant to make certain arguments which later became the basis of the decision gives the appearance of bias even if as Judge Walker states that judges are expected to raise issues even if neither party had already raised them.

On April 30th, 2002 there was an Oral Argument before a three Judge panel in the Second Circuit Court of Appeals.

On May 13th, 2002 a judgment was entered which affirmed the dismissal of the case by the lower court through a Summary Order by a Second Circuit panel. *Herschaft v. The NY Board Of Elections*, 2002 WL 1225107 (2nd Cir., May 2002). Specifically, plaintiff takes issue with the Second Circuit's reasoning that Plaintiff's claim fails because the plaintiff has not shown that his socialization problems constitutes substantial limitations. Citing *Bragdon v. Abbott*, 524 US 624, 639 (1998). This conveniently avoided the issue of History or Record of Impairment Prong applying or not applying in this case as well as substantial doctor's testimony that Plaintiff was indeed

substantially limited in the major life activity of socialization, since his hospitalizations in 1988.

Secondly, the court stated that Plaintiff's Equal Protection claim fails because plaintiff has not shown that the purpose of NY Election law s. 6-138(4) is to discriminate against disabled persons. Citing *Johnson v. Wing*, 178 F. 3rd 611, 615 (2nd Cir., 1999). Plaintiff notes that this standard is different from that established by this court in *Board of Trustees of the University of Alabama v. Garrett*, 21 S. Ct. 955, at 963-64, 966-967 (2000), in which it was held there that a 14th amendment equal protection challenge under rational basis analysis would require plaintiff to negate any reasonable or rational justifications put forth by the defendant for such differential treatment under the A.D.A. It does not mention proof of any intentional discrimination that must be demonstrated in order for the plaintiff to prevail on a 14th amendment challenge like the 2nd Circuit asserted in the Summary Order. *Herschaft, supra.*

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. A US Court of Appeals has entered a decision in conflict with the decision of Other US Court of Appeals on the same important matter.

2. A US Court of Appeals has decided an important question of Federal law that has not been but should be settled by this Court.

3. A US Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

1. A US Court of Appeals has entered a decision in conflict with the decision of Other US Court of Appeals on the same important matter.

As noted in the Questions for Review, there is a split of Authority amongst the Circuits as to whether Socialization constitutes a Major Life's Activity and the evidentiary standards necessary to show a substantial limitation to it.

Compare *Soileau v. Guilford of Maine*, 105 F. 3rd 12, 15 (1st Cir., 1997) (the 'ability to get along with others' is not a major life activity) with *McAlindin v. County of San Diego*, 192 F. 3rd 1226, 1234 (9th Cir., 1999) ('Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of major life activity'.) The Second Circuit in this case assumes without deciding that socialization is a major life activity. Likewise *Cooper v. Olin Corp.*, 246 F.3rd 1083, 1089 (8th Cir. 2001); *Steele v. Thiokol Corp.*, 241 F.3rd 1248, 1255 (10th Cir., 2001) (same).

As stated before, the evidentiary standards necessary to constitute a substantial limitation to this activity has differed amongst the circuits.

For example, in *Soileau v. Guilford of Maine, Inc.*, 105 F.3rd 12 at 15 (1st Cir., 1997), the court justifies its decision that interacting with others does not constitute a major life's activity by stating the following:

"The concept of 'ability to get along with others' is remarkably elastic, perhaps so much so as to make it unworkable as a definition .... Further, whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on

context. Here, Soileau's alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people – losing a girlfriend or being criticized by a supervisor. Soileau's last depressive episode was four years earlier, and he had no apparent difficulties in the interim. To impose legally enforceable duties on an employer based on such an amorphous concept would be problematic . . . . "

The court did not stop there, it stated that 'even if there were a colorable claim that may be made that "ability to get along with others" is or may be (on specific facts) a major life activity under the ADA, the evidence here does not show any substantial limitation.' *Id.*

In particular, the court asserts that 'the evidence does not establish that Soileau had particular difficulty in interacting with others, except for his supervisor.' It notes "[i]mpairment is to be measured in relation to normalcy, or, in any event, to what the average person does. Soileau claims he had to leave pubs and stores when they became crowded. But there is nothing extraordinary about preferring uncrowded places. Soileau performed his normal daily chores, went grocery shopping, and visited pubs. That he left pubs and stores when he felt there were too many people does not establish that the nature and severity of his impairment was substantial." *Id.* at 15-16.

Finally, by way of dicta the court states circumstances where it could be held in the first circuit that interacting with others could be considered a major life's activity: "It may be that a more narrowly defined concept going to the essential attributes of human communication could, in a particular setting, be understood to be a major life activity, but we need not address that question here." *Id.* at 15.

In *Cooper v. Olin Corp.*, 246 F. 3rd 1083, 1089 (8th Cir., 2001), the court assumed without deciding that interacting socially is a major life activity, but that the facts in that case precluded a finding that Cooper suffered from a substantial limitation on social interaction. The court noted that although Cooper stated that she generally avoided speaking to anyone on the phone or socially, "she also testified that she has been married twice, that she has regular contact with family members, including her daughter, that she speaks often with her niece, that she visits and chats with her friends, and that she talks with people when she runs errands."

In our case, in the district court opinion of August 9th, 2001, Judge Amon appears to have understated those factors which related to a substantial limitation on the major life's activity of socialization or the lack of it on the part of plaintiff in this case. On p. *11 of the August 9th, 2001 decision, the court states at most, Dr. Lerner states that plaintiff 'has no real friends' and 'no social outlets at all.' (Lerner Dep. at 17.) In addition, it is true that he also stated there in the deposition on p. 17 but not included in the decision, "He sort of knows some people. He has no real friends. Not one single real friend. He has no social outlets at all. He doesn't go to any social events. He attends a synagogue but is not social there."

Elsewhere Dr. Lerner contends in his deposition that, "if there were an accommodation that he has because of his mental illness that this type of disability carries with it, the difficulty in dealing with people, asking people to help you. Namely to sign a petition or gather signatures That kind of thing he would do better if it was spread out. (Lerner dep. at 21) .... because added to the factor of stress, the activity of gathering petition signatures which

involves socialization with people, an area which he is very weak and which definitely causes the worst severity that he could undergo. There is a very high probability that he can suffer a breakdown." Id.

In response to a question by Mr. Marks, attorney for defendant about whether there is anything about gathering signatures that has a greater potential to cause Plaintiff to decompensate than anything else he has experienced, Dr. Lerner asserts "Yes, he has difficulty coping with life's problems. Working as a librarian is a protected atmosphere. But here . . . he would have to go out and ring doorbells, meet people. That's something he has not been able to do most of his life . . . . He will have to call on people to assist him. But even that requires personal encounters." *Id* at 22. He continues, ". . . . To face people directly in a petition gathering process is very, very difficult. Possibly very traumatic for him." *Id.* at 23.

Thus we see from the above a difficulty on the part of plaintiff going to the essence of human communication occurring in an activity in which socialization is an activity which arguably is very important if not an essential component in politics, in electioneering, and hence the need, necessity in this case for an accommodation for plaintiff who arguably appears substantially limited in the major life's activity of socialization.

2. A US Court of Appeals has decided an important question of Federal law that has not been but should be settled by this Court.

As noted in the Statement of the Case section of this petition, on June 6th, 2001 defendant stipulated that in 1988 (when plaintiff was hospitalized three times in a

period of six months in a psychiatric hospital) Plaintiff was substantially limited in a major life activity.

Although it was not clear from the face of the stipulation itself, there were conclusive testimony introduced through the records of the public hospital where plaintiff was hospitalized, some of which became part of the exhibits in the courts below, regarding just what areas Plaintiff was substantially limited in then in 1988. Some of the activities included an inability to care for himself, and that plaintiff suffered from an impaired judgment and insight ability which included persecutory delusions.

Although there currently is no US Supreme Court precedent regarding the history or record of impairment or disability prong to showing that one is qualified disabled under the ADA under 28 CFR s. 135.104, there is enough case law in the highest courts of the 50 states to give us some guidance as to what this prong entails.

In *Crowley v. Republican National Committee*, 759 A. 2nd 682, 701 (D.C., 2000), it was stated that to demonstrate that he has a "record of impairment", Mr. Crowley must show that he has a history of . . . a mental or physical impairment that substantially limits one or more of his major life activities. Citing *Hamilton v. SW Bell Telephone Co.*, 136 F. 3rd 1047, 1050 (5th Cir., 1991) quoting 29 C.F.R. s. 1630.29(k)1.

In our case however, on page 8 footnote 6 of the August 9th, 2001 decision of *Herschaft v. The NY Board Of Elections*, 2001 US Dist Lexis 11801, 2001 WL 940923 (E.D. NY, 2001) the trial judge concludes without any precedent and contrary to the facts of the case that this prong does not or cannot apply in this case because there is a chance plaintiff is no longer disabled and that therefore

there is no nexus between plaintiff's past disability and the accommodation that he is seeking (which again runs contrary to the testimony and evidence of plaintiff's psychiatrists in this case).

For example, during Dr. Lerner's deposition, the doctor discusses on pgs. 8-10 the GHI patient treatment axis which represent various current diagnosis by the doctor of Plaintiff's condition as it relates to the Diagnostic Statistical Manual in its 4th revision:

He states one axis relates to my illness, schizophrenia/paranoid type, Axis 1- 295.30. (Lerner dep. at 9).

Axis II refers to personality disorders, 301.20, this particular one refers to schizophrenia personality disorder. (Lerner dep. at 9).

Axis IV relates to a problem which have an impact upon plaintiff's functioning. He says there are several of them, which are related to the social environment. *Id.*

Axis V he asserts is a kind of catchall. It's a summary of current level of functioning. He marked me as 55 which was moderate symptoms. He contends that when treatment is completed, that Plaintiff should be at a level of 65, which is where I would have mild symptoms. *Id.* at 9-10.

On page 11 of the doctor's testimony, the defendant's attorney notes a statement in Dr. Lerner's notes about grandiosity and unreal ideas (which is an indication that plaintiff is not all in reality even in this so called high state of functioning according to the trial judge's decision): Dr. Lerner comments "He has unreal ideas as to what he can do. He has grandiose ideas as to his position in life, as to his importance, how he was chosen to bring salvation."

Plaintiff asserts that plaintiff's above delusions is an indication of a present disability unlike what the trial judge stated was reason for not allowing the history or record of impairment prong to not apply in this case. For example, the above description of plaintiff's delusions is part and parcel of having schizophrenia. See Judge Weinstein's decision for his definition of Schizophrenia in *A. v. The NY Board Of Elections*, 99 F. Supp. 2nd 258 (E.D.N.Y., 2000): "Schizophrenia is a psychiatric disorder characterized by a loss of contact with the environment, . . . disorder of feeling and thought as in hallucinations, and delusions and conduct. Citing 2 J. E. Schmidt, Attorneys Dictionary of Medicine (1975).

Finally, Plaintiff notes that the frequency or desired frequency of visits by patient to the doctor could also be viewed as an indicator of present illness or degree of illness of the patient. On page 12 of doctor Lerner's testimony deposition he states that the patient would like to come once a month and the doctor feels because of the severity (emphasis added) of plaintiff's problems that that the plaintiff should come once or twice a week.

3. A US Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. Violation Of State Law

In the May 13th, 2002 decision of the Second Circuit in the case *Herschaft v. The NY Board Of Elections*, 2002 WL 1225107 (2nd Cir., May 2002) the court said in its opinion that it had concurred with the reasoning and logic of the lower court. It stated in particular that plaintiff's ADA position was not adopted because he failed to show

how his socialization problem was substantially limited by his illness. Not decided explicitly was the lower court's determination that even if I were disabled my discrimination claim under the ADA would still fail because 1. The Board of Elections would be violating State law to grant me an accommodation and to do so would be unreasonable; 2. If plaintiff were granted an accommodation it would possibly fundamentally alter the election process. For the following reasons one based on Supreme Court precedent and the other on Principles of logic and Equity these reasons Plaintiff contends are unpersuasive.

In *PGA Tour, Inc. v. Martin*, 532 US 661, 690, 121 S. Ct. 1879, 1897 (2001) (See also footnote 51) the Court rejected the PGA's argument that it could not consider granting an exception to its rules because the rules did not provide for exceptions – as the court notes to allow a municipal or state entity to exempt itself on this basis would allow it to avoid compliance with the ADA altogether.

So too here Plaintiff contends to allow the defendant to argue that an ADA accommodation should not apply in this case because it would be violating state law would allow the state of NY an excuse not to be following the will of Congress on an area in which Congress has expressed its will. Thus NY state's position on the matter not only violates the ADA but also the Supremacy clause of the US constitution.

Secondly, with respect to the issue that there would or could be a fundamental alteration in the election process if plaintiff were to be granted an accommodation. This issue plaintiff argues should be subject to the equitable principal of estoppel.

In the July 09th, 2001 hearing, the attorney for the defendant when asked by the trial judge at p. 28-9 of the hearing testimony "[d]etermining the reasonable accommodation issue . . . it would be required, seeing that a plaintiff was excluded from participating as a result of his disability, defendant would be required to make a reasonable modification to policies, practices and provisions unless the entity could demonstrate that the modifications would fundamentally alter the nature of the service, program or activity. Now you haven't purported to make that showing at all, correct? To which the defendant's attorney responds " . . . I mean it won't fundamentally alter the way the election is being conducted . . . ." It wouldn't affect the administration of the general election in Nov . . . . " At p. 29.

In addition it could be argued that granting an accommodation to a disabled candidate should be no different in the election process as it is in the Bar Examination process where disabled candidates for the Bar exam are accommodated without argument that it would fundamentally alter the Bar examination process, as was argued below by plaintiff.

II. Equal Protection Standard

The court of the Second Circuit in its May 13th, 2002 decision in *Herschaft v. The NY Board Of Elections,* 2002 WL 1225107 (2nd Cir., May 2002), stated that Plaintiff's Equal Protection claim fails because plaintiff has not shown that the purpose of NY Election law s. 6-138(4) is to discriminate against disabled persons. Citing *Johnson v. Wing*, 178 F. 3rd 611, 615 (2nd Cir., 1999). Plaintiff notes that this standard is different from that established by

this court in *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, at 963-64, 966-967 (2000), in which it was held there that a 14th amendment equal protection challenge under rational basis analysis would require plaintiff to negate any reasonable or rational justifications put forth by the defendant for such differential treatment under the A.D.A. It does not mention proof of any intentional discrimination that must be demonstrated in order for the plaintiff to prevail on a 14th amendment challenge like the 2nd Circuit asserted in the Summary Order.

In *Garrett*, the court asserted that "[u]nder rational basis review, where a group possesses distinguishing characteristics relevant to interests the state has the authority to implement, a state's decision to act on the basis of those differences doesn't give rise to a constitutional violation. *City of Cleburne, Texas v. Cleburne Living Center*, 105 S.Ct. 3249 (1985). 'Such classifications cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' *Heller v. Doe*, 509 US 312, 320, 113 S. Ct. 2637 (1993) also quoting *Nordlinger v. Hahn*, 505 US 1, 112 S. Ct. 232 (1992).

'Moreover, the state need not articulate its reasoning at the moment a particular decision is made.' Rather, the burden is upon the challenging party to negative "any reasonable conceivable state of facts that could provide a rational basis for the classification." *Heller, supra*, at 320, 113 S. Ct. 2637.

CONCLUSION

Certiorari should be granted in this case because novel questions and concerns are implicated in this case for which the Supreme Court of the US is or would be well suited to hear and pass judgment on. For example, the case involves the interaction of the ADA act and the election process. Specifically, whether the defendant should be required to accommodate Plaintiff's disability which involves arguably a substantial limitation on the part of plaintiff in the area of Socialization.

Furthermore, there is also a substantial question of the fairness by the 2nd Circuit to affirm the lower courts holding that the History or Record of Impairment prong in this case does not apply in this case because according to the court 'plaintiff might no longer be disabled' when there was substantial testimony that plaintiff was still suffering from Schizophrenia in remission and that according to his two prior psychiatrists rehabilitation would be a lengthy process.

Also involved in the case is whether plaintiff got a fair hearing at all on his Equal Protection violation claim by the 2nd Circuit and the lower court where an erroneous standard appears to have been applied in light of recent ADA decisions on the subject.

Finally, there are questions in the case as a result of the July 9th, 2001 hearing amongst the parties which implicate procedural due process rights being violated arguably by the lower court judge in her handling of the hearing that day that should be addressed by this court.

For these reasons largely, certiorari should be granted in this case, plaintiff asserts.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed May 18, 2002)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the thirteenth day of May two thousand and two.

PRESENT:

HONORABLE ROGER J. MINER,
HONORABLE ROBERT D. SACK,
Circuit Judges,

HONORABLE RICHARD M. BERMAN,*
District Judge.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

ALLEN STUART HERSCHAFT,

Plaintiff-Appellant

-v-

No. 01-9094

NY BOARD OF ELECTIONS,

Defendant-Appellee.

Appearing for Appellant: ALLEN STUART HERSCHAFT, *pro se*, Brooklyn, NY

Appearing for Appellee: JANET L. ZALEON, Assistant Corporation Counsel (Michael A. Cardozo, Corporation Counsel of the City of New York, Kristin M. Helmers, of counsel), New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Carol B. Amon, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, affirmed.

The plaintiff appeals from the district court's entry of summary judgment against him on his claims that: (1) the defendant violated the Americans with Disabilities Act ("ADA") by refusing to provide the plaintiff with extra time to collect nominating signatures for his election petition; (2) the defendant violated the plaintiff's rights under the

Rehabilitation Act for the same reason; and (3) New York Election Law § 6-138(4), which requires candidates to collect signatures, violates the Equal Protection Clause.

We concur in the reasoning and judgment of the district court. The plaintiff's ADA claim fails because the plaintiff has not shown that his socialization problems and sporadic lapses in his ability to care for himself constitute substantial limitations. *See Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (under the ADA a plaintiff must show a "substantial limit" on a major life activity). The plaintiff's claim under the Rehabilitation Act fails because the defendant does not receive federal funding. *See* 29 U.S.C. § 794(a). And the plaintiff's equal protection claim fails because the plaintiff has not shown that the purpose of New York Election Law § 6-138(4) is to discriminate against disabled individuals. *Johnson v. Wing*, 178 F.3d 611, 615 (2d Cir. 1999) (a facially neutral statute only violates the Equal Protection Clause where its effect on disabled individuals reflects "purposeful discrimination").

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk

/s/ Lucille Carr — 5/13/02
By: — Date

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALLEN HERSCHAFT,	x	
Plaintiff,	:	NOT FOR PUBLICATION
-against-	:	MEMORANDUM AND ORDER
THE NEW YORK BOARD OF ELECTIONS,	:	00 CV 2748 (CBA)
Defendant.	x	

AMON, UNITED STATES DISTRICT JUDGE

Introduction

Before the Court are *pro se* plaintiff Allen Herschaft's and defendant New York Board of Elections' ("Board of Elections") cross-motions for summary judgment. Plaintiff is seeking to run as an independent candidate for the New York City Council ("City Council") in the November 2001 election. He contends, *inter alia*, that he should be granted pursuant to Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1201 *et seq.*, an extension of the six-week time period provided by New York Election Law § 6-138(4) for gathering signatures for an independent nominating petition, and that § 6-138(4) violates the Equal Protection Clause of the Fourteenth Amendment.[1] For the

[1] Plaintiff also alleges violations of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796, the New York State Human Rights Law, N.Y. Exec. L. § 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.*

reasons stated herein, the Court grants defendant's motion and denies plaintiff's motion.

Background

The following undisputed facts are taken from plaintiff's amended complaint, defendant's Rule 56.1 Statement, and relevant affidavits, exhibits, and deposition testimony.[2]

Plaintiff seeks to run as an independent candidate for the City Council from the 48th District in Brooklyn in the 2001 election.

Under the New York Election Law, in order to run for City Council, an independent candidate must file with the Board of Elections a nominating petition containing either 2,700 signatures, or the signatures of five percent of the total number of votes cast for governor in the last gubernatorial election from the candidate's council district, whichever is less. *See* N.Y. Elec. L. § 6-142(2). For the November 2001 election, an independent candidate must

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[2] As the Court has extensively detailed the procedural history of this case in prior opinions, only a brief review is necessary here. This case was reassigned to this Court on remand, after the Second Circuit reversed Judge Weinstein's decision granting defendant's motion to dismiss plaintiff's ADA claim. *See Herschaft v. N.Y. Bd. Of Elections*, 234 F.3d 1262 (table), 2000 WL 1655036 (2d Cir. Nov. 3, 2000), *cert. denied*, 121 S.Ct. 777 (Jan. 8, 2001). After receiving additional briefing and hearing oral argument on April 12, 2001, this Court denied the motion to dismiss. Plaintiff subsequently submitted a motion to amend his complaint to include several new claims, which the Court granted, and a motion for a preliminary injunction, which the Court denied.

file a nominating petition containing 1,460 valid signatures, five percent of the 29,190 votes cast in the last gubernatorial election from the 48th council district.

These signatures must be collected in a certain six-week period pursuant to New York Election Law § 6-138(4).[3] This year, that period runs from July 10, 2001 to August 21, 2001. August 27, 2001 is the last day for an independent candidate to accept or decline an independent nomination.

Plaintiff suffers from clinically diagnosed paranoid schizophrenia. As a result of his schizophrenia, plaintiff was hospitalized on several occasions in 1988, for a total period of six months, and in July 2000, for a period of two weeks. The parties have stipulated that "[i]n 1988, plaintiff was disabled within the meaning of the Americans with Disabilities Act, in that at that time, he had a mental impairment that substantially limited a major life activity." (Stipulation ¶ 1.)

Plaintiff graduated from McGill University in December 1985. He enrolled at the Detroit College of Law in the Fall of 1986 and completed one year of law school, before withdrawing in the Spring of 1988.

He subsequently received a certificate in paralegal studies from New York University in 1991, and a Masters in Library Science from Pratt Institute in 1992 or 1993. Plaintiff has been employed full-time as a law librarian by the City Council since March 1993.

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[3] Section 6-138(4) provides, in relevant part, that "[a] signature made earlier than six weeks prior to the last day to file independent petitions shall not be counted."

Plaintiff is currently being treated by Benjamin Lerner, a psychologist, and Dr. Alexander Khayman, a psychiatrist. Plaintiff takes a prescribed medication, Prolixin, to treat his schizophrenia.

In Dr. Lerner's opinion, the task of collecting signatures for a nominating petition within the specified six-week time period creates "a very high probability that [plaintiff] might suffer a breakdown." (Lerner Dep. at 21.) Extending the collection period, in his opinion, "might possibly help him avoid a breakdown." (Lerner Dep. at 23.)

However, even if plaintiff were given additional time, Dr. Lerner stated that plaintiff could still suffer a breakdown. Dr. Lerner also opined that were plaintiff able to gather the necessary signatures to appear on the ballot for City Counsel, the stress of actually campaigning could also create the potential for a breakdown.

The Board of Elections does not receive any federal funds.[4]

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[4] Although plaintiff disputes this fact, there is no legitimate basis for his challenge. Defendant has submitted the affidavit of Daniel DeFrancesco, the Executive Director of the Board of Elections in the City of New York, who states that the funds for the budget of the Board of Elections are drawn solely from the City's tax levies. (DeFrancesco Decl. ¶ 2.) Plaintiff states in his opposition only that it "go[es] against logic and reasoning" that the Board of Elections does not receive state or federal funding. (Pl.'s Reply Br. to the Def.'s Cross-Motion for Summary Judgment, at 4.) Plaintiff's assertion is not sufficient to raise a genuine dispute as to this fact.

Discussion

I. The ADA Claim

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.130(a). In order to prevail under this section of the ADA, plaintiff must prove that: (1) he was a qualified individual with a disability, (2) who, by reason of his disability, was excluded from participation in (3) a service, program, or activity of a public entity. *See Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999); *Katzowitz v. Long Island R.R.*, 58 F. Supp. 2d 34, 37 (E.D.N.Y. 1999). Title II "applies to action that carries a discriminatory effect, regardless of the government's motive or intent." *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 206 (E.D.N.Y. 2000) (internal brackets omitted) (quoting *Tyler v. City of Manhattan*, 857 F. Supp. 800, 817 (D. Kan. 1994)).

The Second Circuit has ruled in this case that the Board of Elections is a covered entity, so this Court need only address the other two elements.

A. Qualified Individual With A Disability

As defined in the ADA, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2); *see also* 28 C.F.R. 135.104. The Department of

Justice's implementing regulations for Title II of the ADA ("the ADA regulations")[5] define "disability" as:

> a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

28 C.F.R. § 135.104; *cf.* 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). Defendant argues that plaintiff cannot prove that he presently has a disability under the ADA.

"The determination of whether an individual is disabled under the ADA is made on an individualized, case-by-case basis." *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 151 (2d Cir. 1998). The Supreme Court has noted that three requirements must be met in order for a plaintiff to show that he has a "disability" for the purposes of the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 632-639 (1998); *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 641 (2d Cir. 1998). First, plaintiff must have a "physical impairment." *Bragdon*, 524 U.S. at 632. Second, plaintiff must assert a "major life activity" that is affected by the impairment. *Id.* at 637. "Major life activit[ies]" include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R.

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[5] The regulations are generally entitled to controlling weight, unless they are "arbitrary [sic] capricious, or manifestly contrary to the statute," *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 n. 8 (2d Cir. 1997) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

§ 35.104; *see Reeves*, 140 F.3d at 150. Third, the impairment must be "a substantial limit on the major life activity [he] asserts." *Bragdon*, 524 U.S. at 639.

In considering such factors, a court must also make reference to corrective measures. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999). For example, if a person with poor vision is able to function without limitation by wearing glasses or contact lenses, then he is not disabled under the ADA. *See id.*; *see also Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520-21 (1999) (use of medication to correct high blood pressure); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) (use of inhalers and medication to correct asthma).

Plaintiff has been diagnosed with schizophrenia, paranoid type, which defendant concedes is a "physical or mental impairment," under the ADA regulations. 28 C.F.R. § 135.104. Defendant argues, however, that plaintiff is not substantially limited in a major life activity, and is therefore not disabled for the purposes of the ADA. For his part, plaintiff, and his treating psychologist, contend that plaintiff is substantially limited in a number of major life activities, primarily caring for himself, and interacting with others socially.[6]

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[6] Plaintiff also relies on the alternate definition of "disability" in 28 C.F.R. § 135.104, asserting that he has a "record" of a disability under the ADA. As defendant has stipulated that in [sic] "[i]n 1988, plaintiff was disabled within the meaning of the Americans with Disabilities Act, in that at that time, he had a mental impairment that substantially limited a major life activity," it cannot contest that plaintiff has a record of a qualifying disability. (Stipulation, ¶ 1.) The alternate definition of disability does not seem applicable in this case, however, because there is no nexus between plaintiff's past disability and the accommodation that he is seeking. As a matter of logic, to the extent

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The question of whether an individual is substantially limited with respect to a major life activity is a mixed question of law and fact. *See Bartlett v. New York State Board of Law Examiners*, 226 F.3d 69, 80 (2d Cir. 2000) (on remand). In this case, the facts concerning the nature of plaintiff's mental impairment are not in dispute. Dr. Lerner has testified that when plaintiff has a breakdown, he "does not bathe[,] change his clothing, eat" and he is "disheveled." (Lerner Dep. at 17.) Plaintiff also "has serious deficits of socialization," and "makes a very poor impression" when speaking to others. (*Id.* at 17-18.) Although he is capable of learning and working, in Dr. Lerner's opinion, plaintiff is "far below his ability." (*Id.* at 18-19.) Plaintiff testified similarly that he believes he is limited in learning and working, because he was not able to complete law school, and occasionally needs to take a half day off from work. (Herschaft Dep. at 18-21.)

These undisputed facts are not sufficient to establish that plaintiff is presently substantially limited in a major life activity. First, although Dr. Lerner contends plaintiff is limited in taking care of himself, it is only when plaintiff has a breakdown. Plaintiff has only apparently suffered such a breakdown twice in the past 13 years, and he admits that he is not currently limited in caring for himself. (Herschaft Dep. at 17.) Such sporadic lapses in his ability to care for himself do not constitute a substantial limitation. *See EEOC v. Sara Lee Corp.*, 237 F.3d 349, 352 (4th Cir. 2001) (occasional seizures due to epilepsy did not

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that plaintiff is being excluded from participating in the 2001 City Council election, it is because he has a *present* disability. If plaintiff is no longer disabled, the election procedures would presumably not be burdensome, and plaintiff would not need any special accommodation.

substantially limit plaintiff in caring for herself); *Horwitz v. L & JG Stickley, Inc.*, 122 F. Supp. 2d 350, 355 (N.D.N.Y. 2000) (occasional episodes of depression and mania related to plaintiff's bipolar disorder "appear to be isolated and sporadic – insufficient to substantially limit the major life activities of caring for herself and/or socializing"). This is especially true in light of the fact that plaintiff is currently being treated by a psychologist and a psychiatrist, and takes prescribed medication to control the effects of his schizophrenia. *See Horwitz*, 122 F. Supp. 2d at 355.

Second, plaintiff also cannot prove that he is substantially limited in learning or working. Plaintiff received a certificate in paralegal studies from New York University in 1991, and a Masters in Library Science from Pratt Institute in 1992 or 1993, and has been employed full-time as a law librarian by the City Council since March 1993. These substantial achievements indicate that, whatever the limitations he might have because of his schizophrenia, plaintiff is not significantly limited in learning or working.

Finally, even assuming that socialization is a major life activity for the purposes of the ADA, which is by no means clear, *see Horwitz*, 122 F. Supp. 2d at 354 n. 3 (noting that "the Court seriously doubts that socializing qualifies as a major life activity"),[7] plaintiff cannot

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[7] There is a split of authority on the question. *Compare Soileau v. Guilford of Maine*, 105 F.3d 12, 15 (1st Cir. 1997) (the "ability to get along with others" is not a major life activity *with McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) ("Because interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.'"). The

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establish that he is substantially limited in socialization. In *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999), the Ninth Circuit held that in order to be substantially limited in interacting with others, the plaintiff must show "that his relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." *Id.* at 1235 (internal quotation marks omitted). Plaintiff fails to make such a showing here. At most, Dr. Lerner states that plaintiff "has no real friends" and "no social outlets at all." (Lerner Dep. at 17.) That is simply not sufficient evidence to establish that plaintiff is substantially limited in his social interactions, when the record reflects that he was able to attend school, and to work as a librarian, without problems.

Based on the undisputed facts in the record, plaintiff is unable to show that he is disabled for the purposes of the ADA. Defendants are therefore entitled to summary judgment on this claim.[8]

Second Circuit has not addressed the issue. *See also Cooper v. Olin Corp.*, 246 F.3d 1083, 1089 (8th Cir. 2001) (assuming without deciding that socialization is a major life activity); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir. 2001) (same).

[8] There is no equivalent to Title II of the ADA in either the New York State Human Rights Law, N.Y. Exec. L. § 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.*, but even assuming that there was, the same reasoning would apply to plaintiff's state law claims.

B. Excluded From Participation

Even if the Court were to assume, *arguendo*, that plaintiff was disabled under the ADA, plaintiff's claims would still fail however. As an initial matter, it is not clear to the Court that plaintiff can show that he is being excluded from participating in the 2001 election by reason of his disability (assuming he has a qualifying disability), as is necessary under the ADA. Plaintiff complains that the six-week time period for gathering signatures for an independent nominating petition provided for by New York Election Law § 6-138(4) in effect excludes him from the election.

At best, however, whether plaintiff's disability in fact precludes him from participating in the election is speculative. Dr. Lerner testified that there is "very high probability" that plaintiff will suffer a breakdown if he is required to gather signatures in the six-week time period. (Lerner Dep. at 21.) Similarly, plaintiff testified that there is the "danger that taking on too many activities . . . will cause me to suffer a breakdown." (Herschaft Dep. at 13.) Nevertheless, there is no dispute that plaintiff might not suffer a breakdown at all. Even according to plaintiff, his disability does "not necessarily" prevent him [sic] gathering the requisite number of signatures within six weeks. (*Id.*) Accordingly, plaintiff's claim that he is in fact being excluded from participating in the upcoming election as a result of his disability is unsupported.

C. Reasonable Accommodation

In any event, defendant would still be entitled to summary judgment even assuming that plaintiff has a disability, and is being excluded from participating in the

2001 elections as a result. The ADA regulations only require a defendant to "make *reasonable* modifications in policies, practices, or procedures" to accommodate an aggrieved plaintiff. 28 C.F.R. § 35.130(7) (emphasis added); *see Alexander v. Choate*, 469 U.S. 287, 301 (1985) (a disabled individual "must be provided with meaningful access to the benefit that the grantee offers . . . ; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made"). A public entity is not required to make modifications that are unreasonable or that "would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(7).

As the ADA does not "articulate a precise test for determining whether a particular modification is 'reasonable'" courts look to cases interpreting the Rehabilitation Act for guidance. *Staron v. McDonald's Corp.*, 51 F.3d 353, 355-56 (2d Cir. 1995); *see also* 28 C.F.R. 35.103; *Pascuiti v. New York Yankees*, 87 F. Supp. 2d 221, 223 (S.D.N.Y. 1999). Under the burden shifting standard established in *Borkowski v. Valley Central School District*, 63 F.3d 131, 138 (2d Cir. 1995), plaintiff bears the initial burden, which is not heavy, of suggesting a reasonable accommodation. The "determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of disability in question and the cost to the organization would implement it." *Staron*, 51 F.3d at 356. Once a plaintiff has put forward what appears to be a reasonable accommodation, it then falls on the defendant to show that the accommodation is unreasonable, or that the proposed modifications would fundamentally alter the nature of the public service

or program, or would result in undue hardship. *Borkowski,* 63 F.3d at 138.

In this case, plaintiff has suggested that he be granted a two- to three-week extension of time within which to gather signatures for his nominating petition. Such an accommodation, although not excessive in scope, is unreasonable simply because it would require the Board of Elections to violate a state statute requiring that signatures for independent nominating petitions be gathered and submitted within a certain time frame. Section 6-138(4) provides that "[a] signature made earlier than six weeks prior to the last day to file independent petitions *shall not* be counted." N.Y. Elec. L. § 6-138(4) (emphasis added). The Board of Elections has no statutory authority to waive the requirement. It is the Court's opinion that an accommodation that would require a defendant to violate an otherwise constitutional[9] state law is inherently unreasonable.

Moreover, even if the current deadlines were not mandated by the state legislature, plaintiff's requested accommodation could not be granted, because it would require the Board of Elections to fundamentally alter the election process. There are strict deadlines imposed on candidates throughout an election to ensure that the process is orderly and fair. With respect to independent candidates specifically, deadlines have been established to provide time for the Board of Elections to review independent nominating petitions and any challenges to the

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[9] The constitutionality of N.Y. Elec. L. § 6-138(4) is discussed below and in Judge Weinstein's prior opinion in this case, *A. v. New York Board of Elections*, 99 F. Supp. 2d 258 (E.D.N.Y. 2000).

signatures contained in the petitions before the candidate is placed on the ballot. (*See* Marks Aff., Ex. C.) Any modification of the deadlines to accommodate plaintiff would thus require the Board of Elections to set an entirely different schedule for him. Not only is it unreasonable for the Board of Elections to have to set an individual schedule for plaintiff, it would fundamentally alter the nature of the election to have the election proceed according to one timetable for plaintiff, and according to a different timetable for the other candidates in the election.[10]

II. The Equal Protection Claim

The Court also grants defendant's motion for summary judgment with respect to plaintiff's constitutional challenge to New York Election Law § 6-138(4) under the Equal Protection Clause of the Fourteenth Amendment.[11] The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal

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[10] The Court notes additionally that the "effectiveness" of plaintiff's requested accommodation "in light of the nature of disability in question" is questionable. *Staron*, 51 F.3d at 356. According to Dr. Lerner, plaintiff would still be susceptible to a breakdown even if he were granted an extension, and the stress from running for political office alone, without reference to the signature gathering deadlines, might cause a breakdown. Under the circumstances, therefore, it is not clear any extension would make much of a difference.

[11] This claim is not barred by res judicata as defendant contends. In his original complaint, which was dismissed, plaintiff asserted that N.Y. Elec. L. § 6-138(4) violated the Fourteenth Amendment because it placed an undue burden on ballot access. *See A. v. New York Board of Elections*, 99 F. Supp. 2d 258, 260 (E.D.N.Y. 2000). In his amended complaint, plaintiff now contends that § 6-138(4) violates the Equal Protection Clause of the Fourteenth Amendment. That claim has never been litigated on the merits.

protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Since § 6-138(4) is facially neutral, it only violates the Equal Protection Clause where its effect on individuals with disabilities reflects "purposeful discrimination." *Johnson v. Wing*, 178 F.3d 611, 615 (2d Cir. 1999).[12] As there is absolutely no suggestion that the state legislature enacted § 6-138(4) "not 'in spite of' of its adverse effect on the disabled but *because* it would have that effect," *id.* (emphasis in original), the statute does not violate the Fourteenth Amendment.

III. The Rehabilitation Act Claim

Plaintiff's Rehabilitation Act claim also fails as a matter of law. Section 504(a) of the Rehabilitation Act provides in relevant part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected

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[12] Moreover, even if the statute did classify individuals according to disability, it would still not violate the Equal Protection Clause. Since no suspect class is involved, the statute would be sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440; *Romer v. Evans*, 517 U.S. 620, 631 (1996). As Judge Weinstein has previously determined, § 6-138(4)'s requirements for collecting petition signatures are rationally related to the legitimate state interest in conducting its elections in an orderly fashion. *See A. v. New York Board of Elections*, 99 F. Supp. 2d 258, 261 (E.D.N.Y. 2000). Accordingly, § 6-138, even to the extent that it specifically burdened individuals with mental impairments, would be constitutional.

> to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

29 U.S.C. § 794(a). In order to state a valid claim under § 504, a plaintiff must therefore show: (1) that he has a disability for the purposes of the Rehabilitation Act; [sic] that he was "otherwise qualified" for the benefit that he [sic] been denied; (3) that he has been denied the benefits "solely by reason" of his disability; and (4) that the benefit is part of a "program or activity receiving Federal financial assistance." *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998); *accord D'Amico v. City of New York*, 132 F.3d 145, 150 (2d Cir. 1998). There is no genuine dispute in this case that the Board of Elections does not receive any federal funding. Accordingly, plaintiff cannot establish a violation of the Rehabilitation Act.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment is granted, and plaintiff's motion for summary judgment is denied. The Clerk of the Court is directed to close the case.

SO ORDERED.

Dated: Brooklyn, New York
August 9, 2001

/s/ Carol Bagley Amon
Carol Bagley Amon
United States
District Judge

JUDICIAL COUNCIL OF THE
SECOND CIRCUIT

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In re No. 02-8503
CHARGE OF JUDICIAL MISCONDUCT

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(Filed April 18, 2002)

John M. Walker, Jr., Chief Judge:

On January 17, 2002, the Complainant filed a complaint with the Clerk's Office for the U.S. Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 372(c) and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers ("the Local Rules"), charging a district judge of this Circuit ("the Judge") with misconduct.

Background and Allegations:

The Complainant was the plaintiff in a civil action over which the Judge presided. The Complainant alleges that at oral argument on the defendant's motion for summary judgment, the Judge "essentially led or walked defendant through the case that it ought to have made (which it later successfully went on to do)" and later "ruled against [the Complainant] on the grounds largely fashioned at this hearing . . . through the work of the court and the defendant." The Complainant also alleges that the Judge stated to the defendant's attorney, "I will take your word for it," when that attorney failed to state his authority for certain legal arguments. The Complainant alleges that the Judge's actions demonstrate her bias in favor of the defendant. The Complainant has attached a copy of a

transcript containing the oral argument on the summary judgment motion.

Disposition:

The complaint must be dismissed.

The Complainant's allegation that the Judge was biased must be dismissed since it is presented without any factual support whatsoever and, thus, is frivolous within the meaning of § 372(c)(3)(A)(iii) and Local Rule 4(c)(3). The comments made by the Judge at the oral argument on the motion cannot reasonably be construed as suggesting any bias on the part of the Judge. The transcript merely reflects the Judge's impatience with the defendant's attorney for raising various arguments for the first time at the oral argument, and the Judge's attempts to explore the relevant issues. Judges are allowed, and expected, to raise and analyze issues that are relevant to an action even if the parties fail to do so.

To the extent that the Complainant challenges the Judge's decisions and rulings in the district court action, such direct challenges to a decision or ruling may not be brought under the judicial misconduct provisions of § 372(c). *See* 28 U.S.C. § 372(c)(3)(A)(ii); Local Rule 4(c)(2); *see also* Local Rule 1(b) (section 372 does not cover "wrong decisions – even very wrong decisions – in the course of hearings, trials, or appeals."). Such challenges must be pursued through normal appellate procedures. *See* Local Rule 1(e) ("The complaint procedure is not intended to provide a means of obtaining review of a judge's or magistrate judge's decision or ruling in a case. The judicial council of the circuit . . . does not have the power to change a decision or ruling. Only a court can do that.").

The Clerk is directed to transmit copies of this order to the Complainant and to the Judge.

/s/ J M Walker, Jr.
JOHN M. WALKER, JR.
Chief Judge

Signed: New York, New York
April 18, 2002

EXHIBIT #4

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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ALLEN HERSCHAFT,

Plaintiff,

-against-

THE NY BOARD OF ELECTIONS,

Defendant.

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STIPULATION

CV-00-2748 (CBA)

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action that:

1. In 1988, plaintiff was disabled within the meaning of the Americans with Disabilities Act, in that at that time, he had a mental impairment that substantially limited a major life activity.

2. Plaintiff withdraws his subpoena for records of the New York City Police Department and waives any right to seek records of the New York City Police Department in this case.

Dated: New York, New York

June 4, 2001

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(212) 788-0884

By: /s/ Allen Herschaft
ALLEN HERSCHAFT

By: /s/ Paul Marks
PAUL MARKS
Assistant Corporation Counsel
(PM 9558)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALLEN HERSCHAFT,

Plaintiff,

-against-

THE NY BOARD OF ELECTIONS,

Defendant.

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100 Church Street
New York, New York

May 24, 2001
10:00 A.M.

DEPOSITION of BENJAMIN LERNER, taken pursuant to the Federal Rules of Civil Procedure and Notice, held at the above-mentioned time and place before Lynelle Rupe, a Notary Public of the State of New York.

[2] APPEARANCES:

OFFICE OF THE CORPORATION COUNSEL

Attorneys for Defendant

100 Church Street

New York, New York 10007

BY: PAUL MARKS, ESQ.

[3] Stipulations

IT IS HEREBY STIPULATED AND AGREED by and among counsel for the respective parties, hereto, that the filing, sealing and certification of the within deposition shall be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED that all objections, except to the form of the question, shall be reserved to the time of the trial;

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed before any Notary Public with the same force and effect as if signed and sworn to by the Court.

[4] B. Lerner

BENJAMIN LERNER, having first been duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY

MR. MARKS:

Q. Please state your name for the record.

A. Benjamin Lerner.

Q. What is your address?

A. 1815 Avenue K, Brooklyn, New York 11230.

MR. MARKS: Could you mark these, please.

(Handwritten notes were marked as Defendant's Exhibit-A for identification; 5/24/01, L.R.)

(GHI form was marked as Defendant's Exhibit-B for identification; 5/24/01, L.R.)

(Letter from Dr. Lerner was marked as Defendant's Exhibit-C for identification; 5/24/01, L.R.)

Q. Good morning, Dr Lerner, my name is Paul Marks and I'm assistant corporate counsel in the New York City Law Department. I represent the [5] defendant in this case, the Board of Elections in the City of New York.

I'm going to be asking you some questions, particularly about your treatment of the plaintiff in this case, Allen Herschaft.

If you don't understand the question let me know and I will rephrase it. If you want to take a break, also let me know.

Dr. Lerner, what is your current occupation. Lerner, what is your current occupation?

A. I'm a psychologist.

Q. How long have you been a psychologist?

A. I have been in practice since January 1962. Prior to that I worked for an agency.

Q. How long have you been in practice?

A. Since 1962.

Q. Are you affiliated with any medical facility, hospitals or anything like that?

A. No.

Q. Could you briefly describe your educational background?

A. I received a BS at Yeshiva University in New York City in 1961. And I have been [6] employed in a number of organizations, primarily with the New York City Board of Education for 34 years as I [sic] psychologist and rising to center administrator where I was in charge of mental health which employed 250 people. It was the largest mental health clinic of its time.

I have been on the faculty of Brooklyn College and Long Island University, both undergraduate and graduate. I have taught a New York State mandated course in identification and recording of child abuse and child sexual abuse. I have been called upon as a consultant to Superior Court and Family Court specifically Superior of Kings County, New York County and Bronx County. I have also served as a consultant to the Family Court of Richmond County and Kings County. I have also been asked to testify as an expert in various courts at various times.

I have various certifications. I'm a diplomat of the American Board of Professional Psychologists. I am licensed as a New York State Psychologist. And also New York State School Psychologist. I also have a rating code for worker's compensation. And I have also been [7] designated by them as an independent medical examiner.

I'm also on the 18 B. Assigned counsel of the Second Appellate Division, Supreme Court Second Division Department.

Q. Is Allen Herschaft currently a patient of yours?

A. Yes.

Q. How did he originally come to be a patient of yours; was he referred by somebody?

A. He's a subscriber to GHI as a City employee. He was looking for a therapist. He contacted GHI who referred him to me.

Q. Dr. Lerner, I'm going to show you what's been marked as Defendant's A and B. And I'm going to ask you some questions about them.

First, if you can identify for me what they are starting with A?

A. Exhibit A are my office notes of my treatment of Allen Herschaft. Exhibit B is a continuing outpatient treatment report which I sent into GHI in which I summarize and explained his current condition, at that time, and also explained the need for additional treatment.

[8] Specifically, he's entitled to a certain amount of visits under his coverage. GHI farms them out in small amounts and they require the treating provider to give regular updates on his condition.

Q. First, I'm going to ask about Exhibit-B, the form that you sent to GHI.

If I can direct your attention to section DSM IV; what does DSM mean?

A. American Psychiatric Association in conjunction with others, including the American Psychological. They issue a form of classifications of mental illnesses and it has gone through various revisions over the years. And it's called Diagnostic Statistical Manual.

And the roman numeral IV means fourth revision, which is the current one. This has a listing and description of all types of mental illnesses.

Q. Under the heading diagnosis there are spaces, several of them, referring to various Axis. Could you indicate to me which ones you filled in; could you explain what you filled in under the DSM diagnosis?

[9] A. Axis is a broad category of problems. And within that axis there can be many problems. Axis I refers to the type of mental illness. And for axis one I put in 295.30 which refers to an illness, schizophrenia, paranoid type.

Axis II refers to personality disorders. And this particular one, 301.20 refers to schizophrenia personality disorder.

The third axis refers to medical problems which may have caused the mental and emotional problems. And in his case the answer is none.

Axis IV refers to problems which may have an impact upon his functioning. There are several cases and one of them, which I call legislated problems, related to social environment.

And axis V which is a number designation, is a specific number. Kind of a catchall. It's kind of a summary of his current level of function. And I marked him as functioning at a level of 55 which was moderate symptoms. And I expect that when treatment is [10] completed that he should reach a level of 65 which is where he would have mild symptoms.

Q. I see on the form, on the lat page, it indicates that you signed it on February 26, 2001?

A. Correct.

Q. Has the DSM IV changed from the date of February 26, 2001 to the present?

A. No.

Q. I have some questions about the form. On page five there's a reference to medication and it indicates that, I guess, that Mr. Herschaft has been provided by a psychiatrist, Prolixin?

A. That's correct.

Q. What is Prolixin?

A. I cannot give an accurate answer because I'm not a psychiatrist. To the best of my understanding, it's a medication used to control psychotic problems.

Q. There's a heading, clinical formulation also on page five?

A. I see it.

Q. The first sentence under it, there's a space that you filled in. The first sentence it [11] reads, PT which I assume means patient, it says patient trying to run for City Council. There's a hyphen, grandiosity and unreal ideas. What did you mean by that statement?

A. First part is he's running for City Council. he has unreal ideas as to what he can do. He has grandiose ideas as to his position in life, as to his importance, how he was chosen to bring salvation in a sense and help humanity. He has a whole group of ideas, of reference, describing

himself as being a very special person that's uniquely selected by God, before he was born, to unite people and bring them together so that there will be peace around the world. So it will be a better place.

Q. Has Mr. Herschaft discussed with you his desire to run for City Council?

A. Yes.

Q. Has he discussed the reasons why he wants to?

A. Yes.

Q. What has he said about that?

A. Very much about what I said before. Namely, that he has been given very significant [12] ideas of how to help people. And that he has a unique role. That he's a very special person.

Q. I want to try to get a sense of the periods that you treated Mr. Herschaft.

From reviewing the notes of your sessions with him, it appears that you treated him three separate periods?

A. Correct.

Q. One appears, and you can correct me if I'm wrong, from January 1, 1999 through August 19, 1999. Then again from June 8, 2000 through June 16, 2000. And then from January 22, 2001 to the present?

A. Correct.

Q. Is there a reason why the treatment has been in these three separate periods rather than continuous?

A. Yes. Which is not A typical. He's presenting resistance the treatment which I feel he should have.

If you see in my notes, we discussed he would like to come see me once a month and I feel, because of the severity of his problems, he should come once a week, twice a week. We'll live [13] with managed care and make it once a week.

There's also the question about his medication. He stopped taking medication at some point. And my opinion is that he should be taking medication. How it should be done and administered and so on have been issues that have been difficult to resolve.

The management of this patient has not been a simple and direct one.

Now, then we broke off the first time it was in 1999. He did not want to come. I was already seeing him once every two weeks, which was against my own feelings, my own opinion. Even that he tells us was too often.

It is my professional opinion that he needs to be seen at least once weekly on a regular basis for the foreseeable future.

He came back to me for the second time June 2000. That's when he began to talk about running for City Council. He had already begun to prepare for it. He was working on it already. And he was already involved in the court case. He told me about it, of course, which we discussed. My concern was not to get him [14] elected, I'm not into politics. My issue is to see to it that whether or not he runs, it should not cause him to have any type of breakdown or any serious problems.

He came by and he asked me to write a letter for him to the Second Circuit Court of Appeals. Which I did. Which you have. And apparently, that may have been his motivation in coming to see me. Because, we did not get into it.

The third time he came back to me was in June of 2001. And in the interim he had been hospitalized. He went to Minonidis Hospital. They did not have any space for him, so they claim, so they sent him to Lutheran. And he stayed there at their advice for two weeks. And again, after two weeks, they discharged him.

But he had a definite breakdown at that point. That was in, probably, July or August. I think in July of 2000. I did not know about it because he did not contact me then.

He came back to me in January of 2001 which is when I saw him again. And I have been seeing him fairly regularly since then.

[15] Q. Do you have any understanding as to what caused the breakdown that resulted in this hospitalization after Lutheran in July of 2000?

A. It's hard to say because I wasn't there at that time. I'll speculate if you want but I cannot say.

Q. Have you seen any records from Lutheran Medical Center?

A. Yes.

Q. Based on your review of the records, what is your opinion?

a. He was overworking himself. According to this, he was not getting sleep. He was not caring for himself. He was very agitated.

Q. Was there any indication as to what the cause of the agitation was?

A. It is suggested that it was because he took on the role of running for City Council.

Q. I'm going to ask you some questions that relate to some of the legal issues in this case. It may sound a little odd when I ask you them at first.

Under some of the statutes that this case has brought, there's an issue as to whether

[16] Mr. Herschaft — would it be correct to refer to him as —

A. Paranoid schizophrenic.

Q. Whether his paranoid schizophrenia substantially limited what the statute refers to as major limits of life activities more prose se, the federal legislation. I'm going to read off of a list of what the regulation refers to as major life activities and ask you whether this is substantially limited in him in any of those activities.

I'll first read down the list and go back?

A. Okay.

Q. Caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

Why don't we start with caring for himself.

If in [sic] you have an opinion if it does. If it does limit that activity you can explain your opinion as to why that is your opinion. That would be good?

A. He is substantially limited in that [17] particular area in a number of ways. He's limited in that when he has a breakdown he does not bathe change his clothing, eat.

Even today he doesn't eat well. When he's functioning at his highest level he survives primarily on pizza.

He dresses neatly but when he has a breakdown he's dishevelled. He has serious deficits of socialization. He sort of knows some people. He has no real friends. Not one single real friend. He has no social outlets at all. He does not go to any social events. He attends a synagogue but he's not social there.

Q. How about performing manual tasks?

A. Well, it's not an issue.

Q. It's not an issue?

A. No.

Q. Seeing?

A. I guess he's okay.

Q. Hearing?

A. Okay.

Q. Speaking?

A. Speaking is an area where he's weak. Before he speaks to you, while he's speaking to [18] you, he just makes a very poor impression. He may roll his eyes, may begin to roll his eyes. He has a certain kind of grimace on his face which, all together, turns people off. And when he

brings out his ideas as to how he can be of help to humanity he certainly turns people off.

Q. Breathing?

A. No problem.

Q. Learning?

A. He's capable of learning. He's far below his ability. He was a law school dropout. At the time he had his breakdown, since that time, he did get a certificate as a paralegal from NYU. And also an MLS degree from Pratt Institute.

Q. Do you know when he obtained his paralegal certificate?

A. No.

Q. Working?

A. Yes, he works. But he doesn't work full days. When he doesn't feel well he just comes in late because he just cannot get out of bed. If he doesn't feel well, he leaves early. He is currently the law librarian for the City Council. He earned 23 thousand dollars a year. It's not [19] particularly a high paying job.

If you consider his intellectual abilities, it's expressly below one who is as bright as he his.

Q. Do you know how long he's held the job as legal law librarian for the City Council?

A. No, I don't know.

Q. Dr. Lerner, I'm going to show you Defendant's C and ask you if you can identify that?

A. This is a letter which he requested me to write to the Second Circuit Court of Appeals.

Q. Dated June 15, 2000. It's on your letterhead and I assume that's your signature?

A. That's correct.

Q. In the second paragraph of the letter you state and I'll read the paragraph. Herschaft advises that he is contemplating running for public office. In my opinion, he would require additional time to carry out the task of collecting signatures because of his psychological disability. The duty of working within normal time parameters would cause him to decompensate [20] severely which may result in a serious breakdown and hospitalization.

Did Mr. Herschaft ever tell you how many signatures he has to gather in order to appear on the ballot?

A. Yes.

Q. Do you remember what that number was?

A. 14 hundred.

Q. Did Mr. Herschaft tell you under what time period the election law requires him to gather these signatures?

A. I think it was about a month. But I'm not sure.

Q. I believe under the current schedule he has from July 10, 2001 to August 21, 2001.

What is the basis of your opinion that the stress, as you said in your letter, to work within the normal time would cause him to decompensate severely?

A. If you add things together. For one, he's working and he has difficulty putting in his full time. And also uses vacation time because he takes time off because of the stress. And it is not the most difficult, most challenging jobs [21] there is.

And yet, that presents some problems. Add to that the task of collecting signatures, which involves socialization with people, an area in which he's very weak and which definitely caused the most severity that he could undergo. There is a very high probability that he might suffer a breakdown.

So, if he could spread that out and if he did not have to do it all so quickly. If there was an accommodation that he has because of his mental illness that this type of disability carries with it, the difficulty in dealing with people, asking people to help you. Namely, to sign a petition or gather signatures. That kind of thing he would do better if it was spread out.

Q. Do you have any opinion as to how much additional time Mr. Herschaft needs beyond the six weeks to gather these 14 hundred and 60 signatures?

A. That's hard to say.

Q. In your opinion, is there anything in particular in the task of gathering signatures that has a greater potential to cause Mr. [22] Herschaft to decompensate beyond anything else in his life; could you explain what decompensate means?

A. Decompensate means to suffer a breakdown.

Q In your opinion, is there anything in particular about the situation of collecting the signatures for the

petition that has greater potential to cause Mr. Herschaft to decompensate than anything else he's experienced?

A. Yes, there is a problem. One of the most difficult tasks he could be facing — he's having difficulty coping with life's problems. Working as a librarian where there are very few confrontations, a protected atmosphere; that job is very minimal. But on the other hand, he would have to go out and ring doorbells, meet people. That's something he has not been able to do most of his life.

He will have to call upon people to assist him. He cannot collect one thousand four hundred and sixty signatures on his own. He has to mobilize or hire people. But even that requires personal encounters.

[23] The issue of socialization is very clear with him. He's very schizoid which means that he keeps to himself. He avoids contact with people. And to have to face people, directly, in a petition gathering process is very, very difficult. Possibly very traumatic for him.

And perhaps in lengthening, increasing the amount of time available to him it might possibly help him avoid a breakdown.

Q. At this point you don't have any opinion as to how much additional time he would need to gather signatures?

A. I would have to calculate it from a political point of view; how many can he do each week. And how many people doing it for him. And I don't think I'm able to do that.

Q. Given the problems that you discussed that Mr. Herschaft would encounter in connection with the task of gathering signatures; is it your opinion, even if Mr.

Herschaft was given some additional time, could he still suffer a breakdown as a result of having to engage in the task of gathering signatures, requiring to deal with other people and so forth as you have discussed?

[24] A. The probability is higher for him than for you or I, yes.

Q. And Mr. Herschaft, to your knowledge, has suffered breakdowns in the past unrelated to the task of gathering signatures?

A. I think the most resent [sic] one in [sic] Lutheran was related to his gearing up for a run for City Counsel.

Q. If Mr. Herschaft were able to obtain the required number of signatures in time to appear on the ballot he would have to campaign?

A. Yes.

Q. Do you have any opinion as to whether the act of campaigning for City Council would create a potential for a breakdown?

A. Yes, it would. It would be very stressful.

Q. If again, another hypothetical question. If he were ever to be elected and required to fulfil [sic] the duties of City Council, of a member of the City Council which involves a tremendous amount of contact with other people, could that cause Mr. Herschaft to have a breakdown?

[25] A. I think it's a question for the electorate rather than myself.

Q. Other than the treatment that you have been providing to Mr. Herschaft, it appears that he's obviously been prescribed medication by at least one psychiatrist?

A. That's right.

Q. Has he seen more than one psychiatrist, to your knowledge?

A. Yes.

Q. Do you know whether these psychiatrists are providing any other treatment?

A. Home medication. He sees a psychiatrist once a month for a very brief interview.

Q. Do you have an opinion as to whether the act of running or seeking election to the City Council has any affect [sic] on Mr. Herschaft's psychological state?

A. Yes.

Q. What is that?

A. It is a severe strain on him. I think he has very limited ability. Extremely limited ability to handle stress. This increase [26] in stress, in this area where he's poorly prepared, it increased the probability of a breakdown. But it's his choice.

Q. Have you made any recommendations to him not to run for City Council, not to seek office?

A. No, I don't feel that I have a right to say that.

Q. And the stress you are referring to is not the stress of gathering signatures, it's the stress in trying to seek office in general?

A. Also to fulfill his vision of himself as the person who can bring about a great deal of good for humanity.

Q. Has Mr. Herschaft ever made statements to you about how much additional time beyond the six weeks set forth in the election law he needed to gather signatures?

A. I don't remember. Perhaps he did but I don't remember.

Q. Would that be in your notes at all?

A. No, I don't think so.

Q. I see in your notes, page six. Go on that page. May 9, 2001. I think it says rested a [27] lot to prepare oral?

A. In Second Circuit on Friday rested a lot to prepare oral arguments on Friday. I [illegible]d advised.

RE: Corporation Council request for my records. Agrees. He signed.

RE: Possible paralegal job in future.

Q. Has Mr. Herschaft discussed with you any of his arguments before the Courts in his case either before the Circuit or District Court?

A. He has mentioned that he is suing because he feels that under the ADA, I think that's the name?

Q. Yes.

A. Under the ADA he is entitled to an accommodation because he is a designated handicapped, disabled person.

Q. Has Mr. Herschaft ever mentioned a second lawsuit he has against the New York City Campaign Funds Board?

A. Yes.

Q. Do you know what that's about?

A. He's told me something about it. I really don't understand it.

[28] Q. Go to page five of your notes and your entry for January 22, 2001?

A. Yes.

Q. Couple of lines under that. I believe —

A. Hospital two weeks, July 2000. They came up with bipolar diagnosis. I questioned that because he's schizophrenic, not bipolar. And I believe that today.

Q. And I believe the reference to medication was prescribed by Lutheran?

A. Yes.

Q. What were those medications?

A. Neurotin three times. Prolixin five milligrams, once a day. Cotentin for dry mouth and it says Dr. Vera of interborough prescribed. And Dr. Khayman. That's gone to see Dr. Khayman.

Q. Do you know where he's gone to see the psychiatrist. Actually, I believe your notes on page six on March 12, it indicated that he might have —

A. Did not workout with Dr. Claugh because it was a long wait. Not available. Some problems setting up an appointment. He saw [29] Khayman on March 2.

Q. Do you know whether Dr. Khayman has prescribed anything?

A Yes.

Q. What has he prescribed?

A. He wants to wean him from Prolixin because Prolixin is a kinesia. He's trying to get him away. That medicine is a problem to take a person off of. And get him started on another medication, Risperdel.

Q. Does Mr. Herschaft live alone?

A. Yes, he lives alone.

Q. Does he have any family in New York City.

(Continued on next page for jurat.)

[30] A. Yes.

Q. Do you know how long he's lived alone?

A. It's been many years. I don't know exactly how many years.

MR. MARKS: Okay. I think that's it. I have no more questions.

(TIME NOTED 11:05 A.M.)

/s/ Benjamin Lerner
BENJAMIN LERNER

Subscribed and sworn to
before me this 4 day
of June 2001.

/s/ Sucille Sciabarra
NOTARY PUBLIC

* * *

CERTIFICATION

[32] I, Lynelle Rupe, a Notary Public in and for the State of New York, do hereby certify:

THAT the witness(es) whose testimony is herein before set forth, was duly sworn by me; and

THAT the within transcript is a true and accurate record of the testimony given by said witness(es).

I further certify that I am not related either by blood or marriage, to any of the parties to this action; and

THAT I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of May 2001.

/s/ Lynelle Rupe
LYNELLE RUPE

[33] ERRATA SHEET

I wish to make the following changes, for the following reasons:

PAGE	LINE	
5	24	CHANGE: from BS to PH.D. REASON: Not BS degree
6	14, 15	CHANGE: Supreme Court, not REASON: _____
6	20	CHANGE: Diplomate, not diplomat REASON: Superior Court
9	10	CHANGE: Schizoid, not schizophren REASON: _____
12	19	CHANGE: a typical, not a typical REASON: _____
14	14	CHANGE: Maimonides Hospital REASON: _____
24	7	CHANGE: recent, not resent REASON: _____
25	14	CHANGE: delete home medication REASON: _____
29	8	CHANGE: Prolixin causes tardive dyskine REASON: _____

__ __ CHANGE: _____

REASON: _____

_____

Exhibit #5 – 00-CV-2748 (CBA)

FORM DSS – 486 (REV. 9/76) (FACE)

MEDICAL REPORT FOR DETERMINATION OF DISABILITY

STATE OF NEW YORK — DEPARTMENT OF SOCIAL SERVICES

SECTION I – IDENTIFICATION (To Be Completed by Submitting Agency)

AGENCY'S NAME AND ADDRESS	PATIENT'S NAME (Last, First, Middle)
Medical Assist Program Mail Recent Program GPO Box 2624 New York, NY 10116	Herschaft, Allen S. PATIENT'S ADDRESS 76 Exeter Street Brooklyn, N.Y. 11235

CASE NUMBER	SEX	AGE
029875729F	[✓] Male [ ] Female	27 yo. [sic]

SECTION II – MEDICAL REPORT – NOTICE TO PHYSICIAN

This patient has made application (reapplication) for Disability Medicaid. Your cooperation in completing the form to show the patient's current condition, focusing on both limitations and remaining capabilities, is requested. Your promptness will insure an early decision on the patient's application. *Please return completed form to the agency in Section I above.*

DATE OF EXAMINATION	1. DIAGNOSIS:
Physical Exam 4/14/89 Psychiatric Exam 11/16/89	Schizophrenia Chronic Undifferentiated Type DSMIIIR – 295.92

2. GENERAL FINDINGS: Report in brief only, referring to Section 4 for detailed report on major disease or disability.	
HEIGHT 5 Ft. 10 In.	WEIGHT 180 Lbs.
BLOOD PRESSURE 114/88	VISION (With Corrections, if any) 20/20
HEARING – [✓] Normal Other:	EYE FINDINGS – [✓] Normal Other:
HEART – [✓] Normal (If abnormal, give a detailed description of the EKG Tracing, or attach a copy of the Tracing)	LUNGS – [✓] Normal (If abnormal, give a detailed description of the X-ray Report)
TEETH – [✓] Normal Other:	ABDOMEN – [✓] Normal Other:
EXTREMITIES (Neurological/Peripheral Arterial Pulsations) – [✓] Normal Other:	
3. HISTORY OF MAJOR DISEASE OR DISABILITY	
DATE OF ONSET 3/87	CAUSE (Check One) [ ] Congenital [ ] Disease [ ] Employment Injury [ ] Other Injury
Give Brief Description of Clinical Course to Date, Including Major Treatment: Multiple Psychiatric Hospitalizations with long term care & medication necessary	
4. DETAILED FINDINGS PERTINENT TO MAJOR DISEASE OR DISABILITY: A. What are the present physical signs and symptoms? (Emphasize how they interfere with functional activities.) N/A	

4. B. What are the present mental signs and symptoms? (Emphasize how these interfere with functional activity.)

thought disorder, inappropriate affect, limited insight & judgment marked susceptibility to stress with resultant psychiatric breakdown

B.1. Does the patient have a marked restriction of daily activities [✓] Yes [ ] No

B.2. Does the patient have a seriously impaired ability to relate to other people? [✓] Yes [ ] No

B.3. I.Q. and Psychologic Test Results: _____

C. Pertinent Laboratory and Pathology Reports: N/A

D. X-Ray Findings and Other Pertinent Test Results:

N/A

5. PAST MEDICAL SUPERVISION (If Known):

6. PRESENT CARE (Including Medications and Dosage):

Prolixin Deconoate 25 mg 1 mg 3 wks.
Cogentin 2 mg [Illegible] & [Illegible]

7. EVALUATION:

A. Is or will patient be able to do usual work?
[ ] Yes [✓] No

B. If answer to (a) is "Yes", when? _____

C. If answer to (a) is "No", can patient do any other type of work? Not at this time [ ] Yes [✓] No
(If yes, specify kind of work below in F.)

D. Is patient expected to recover, at least in part?
in part [✓] Yes [ ] No

E. Is significant improvement likely through medical treatment or rehabilitation? [✓] Yes [ ] No

F. Additional remarks: Rehabilitation will be a lengthy

process due to psychiatric illness.		
8. EXAMINING PHYSICIAN		
SPECIALTY, IF ANY Psychiatry	BOARD CERTIFIED [ ] Yes [✓] No	BOARD ELIGIBLE [✓] Yes [ ] No
WORKMEN'S COMPENSATION Rating: N/A		OTHER
SIGNATURE x /s/ [Illegible] MD		DATE SIGNED 11/17/89

NOTICE
FOR PERSON FILLING OUT FORM – OTHER THAN THE EXAMINING PHYSICIAN

If you have completed this form by copying information from available files, identify name and address of files location below.

FILES LOCATION (Check One) [ ] Agency [ ] Clinic [ ] Hospital		
NAME AND ADDRESS OF CHECKED LOCATION		
SIGNATURE OF COPIER x	TITLE	DATE COPIED

NOTE: The above information will be held CONFIDENTIAL by the agency and the reviewing team, and will be used only in connection with the provision of medical care. The patient will be referred to you for any information he wants as to the report. In the instance of a FAIR HEARING, however, this report, part of the agency's record, will be available

to the patient unless it is deemed likely that knowledge of the contents would have an unfavorable influence on the applicant.

Complaint on Judicial Misconduct Allegations

Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers under 28 USC 372(c).

Statement of Facts

The following information was taken from the transcripts of a hearing in front of Judge Carol Amon on July 09th, 2001 in the Eastern District of NY (A US District Court) in the case *Herschaft v. The NY Board Of Elections* (00-CV-2748).

As will be seen in the following selected excerpts from the transcript proceedings, Judge Amon was engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts at this hearing. It will be seen that she acted unprofessionally and questionably by stating numerous times at this hearing, which was considering the cross-motions for summary judgment by both parties, that the defendant's position was not clear on certain key points or defenses in the case; that she essentially led or walked defendant through the case that it ought to have made (which then it later on successfully went on to do); acted questionably and irresponsibly by doing so when plaintiff in this case was acting pro-se, and who in addition has a mental infirmity, while the defendant in this case was being represented by the all-powerful Corporation Counsel who it appears got plenty of help by the court in the making of its case, at this hearing.

Plaintiff believes the court has thus exhibited bias in its actions, especially given the emphasis of the court to have both parties reach a settlement, an accommodation for plaintiff, and when subsequently at a later date it was

determined that this could not be done, rule against plaintiff on the grounds largely fashioned at this hearing on July 9th, 2001 thorough [sic] the work of the court and the defendant. In addition, at times in the hearing the court asks Mr. Marks for authority for his positions on certain legal questions and Mr. Marks states he does not have any to which the court responds "I will take your word for it." (See p. 31 for example)

1. On page 21, of the July 9, 2001 hearing the court states "why is it that you can't make a reasonable accommodation. Why isn't the accommodation that he seeks reasonable? What is the legal argument to that?

To which Mr. Marks of Corp. Counsel responds "It will violate state law."

The court counters "You never argued that".

On page 23, the court states further "Well, I don't know. Would doing this for Mr. Herschaft throw the system into disarray. I mean, I have no argument before the court on that at all, no argument."

2. On page 28-29, the court states: "Determining the reasonable accommodation issue . . . it would be required, seeing that a plaintiff was excluded from participating as a result of his disability, defendant would be required to make a reasonable modification to policies practices and provisions unless the public entity could demonstrate that the modifications would fundamentally alter the nature of the service, program or activity. Now you haven't purported to make that showing at all, correct?

To which Mr. Marks responds: " . . . I mean it won't fundamentally alter the way the election is being conducted. (P. 29). Also on P. 29 Mr. Marks states, "It

wouldn't affect the administration of the general election in Nov., but to the extent that it expands the period of time for gathering of signatures that's provided for in the election law, it does fundamentally alter that aspect of it. (P. 30).

To which the court asserts: "You haven't ever argued that [to the extent that it fundamentally alters the period of gathering signatures] in your papers. I mean that seems to be one of the issues.

3. Further, on P. 31, Mr. Marks states: "I don't think that record or history of disability has any bearing in this particular instance."

To which the court responds: "Well do you cite any cases to the effect that that has some bearing in this kind of setting?

To which Mr. Marks avers: "No your honor".

And the Court responds: "I take your word for it."

4. At the bottom of p. 33, top of p. 34 the court states: "I mean you're suggesting to me that you can't establish that the accommodation that he is making is not reasonable, unless you were to come up with some case law that says that if in order to make an accommodation you have to violate state election law you know, I don't know that's perhaps an argument. I don't know. But that's not an argument you've made."

5. At the bottom of page 34, the court contends: " . . . I just don't think that the position, the Bd. of Election's position is very well articulated here. It makes it difficult to rule on this case because, you know, I don't think that

the Bd. of Elections has really articulated their position that well. I think you need to do that."

6. Finally on P. 35 the court asserts: "Mr. Marks is there any ability that you have to go back to your people and resolve this case and find a way to give Mr. Herschaft the 2 or 3 weeks that he needs? I just can't believe that it can't be done."

Lower down P. 35 it further states: "If it's not going to create any hardship, why in this one case in order to settle this particular litigation, why couldn't they just do that?"

"I mean you haven't given much of a compelling argument to grant summary judgment on any other ground."

/s/ Allen S. Herschaft
Jan. 16, 2002